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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 637

F. R. PELLICER, individually on behalf of himself as an employee of Railway Express Agency, Inc., a corporation, and representatively on behalf of similarly situated employees of Railway Express Agency, Inc., a corporation,

Petitioner,

versus

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, a voluntary unincorporated labor organization, RAILWAY EXPRESS AGENCY, INC., a corporation, and SILAS McKINNEY, individually as an employee of Railway Express Agency, Inc., a corporation, and as representative of similarly situated employees of Railway Express Agency, Inc., a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARTIN J. PEARL,
Attorney for Petitioner,
204 Smith Building,
Jacksonville 2, Florida,

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SUPREME COURT OF THE UNITED STATES

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No.

F. R. PELLICER, individually on behalf of himself as an employee of Railway Express Agency, Inc., a corporation, and representatively on behalf of similarly situated employees of Railway Express Agency, Inc., a corporation,

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BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, a voluntary unincorporated labor organization, RAILWAY EXPRESS AGENCY, INC., a corporation, and SILAS McKINNEY, individually as an employee of Railway Express Agency, Inc., a corporation, and as representative of similarly situated employees of Railway Express Agency, Inc., a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Justices of the Supreme Court of the United States:

Petitioner, F. R. Pellicer, individually on behalf of him-

self as an employee of Railway Express Agency, Inc., a corporation, and representatively on behalf of similarly situated employees of Railway Express Agency, Inc., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on December 9, 1954, affirming judgment of the United States District Court for the Southern District of Florida entered on October 16, 1953.

Opinions Below

The memorandum opinion of the District Court is reported in 118 Fed. Supp. 254. (R. 71-79) The opinion of the United States Court of Appeals is reported in 217 F. 2d 205. (Appendix A, infra, pp. 8-10).

Jurisdiction

The judgment of the United States Court of Appeals was entered on December 9, 1954. (Appendix B, infra, p. 11) The jurisdiction of this Court is invoked under 28 U. S. C., sec. 1254(1).

Questions Presented

All members of a craft of railway employees are identical in their interest and merit in their employment, working under an existing collective agreement providing only one kind of seniority and only one method of acquiring it. All have the same right under the contract to acquire seniority status. Some have exercised this right, and have seniority; some have not, and have no seniority. The statutory exclusive bargaining representative of the craft amends the contract by creating in members without seniority, seniority rights antedating and superior to seniority rights of members already having seniority. The questions presented are:

1. Does the Railway Labor Act, construed in the

light of the due process clause of the Fifth Amendment of the Federal Constitution, condemn such amendment as unlawful because it discriminates, with detrimental retroactive effects upon accrued rights, among employees of the craft who are identical in their interest and merit in their employment?

2. If the first question be answered in the affirmative, does petitioner's complaint state a cause of action upon which relief can be granted?

Constitutional Provision and Statute Involved

This action involves the Fifth Amendment of the United States Constitution, which provides that no person shall be deprived of property without due process of law; and also involves the federal statute known as the Railway Labor Act (45 U.S.C., secs. 151, et seq.).

Statement of the Case

This is a class action for injunctive and other relief against the respondents named herein, begun in the Circuit Court of Duval County, Florida, by petitioner, F. R. Pellicer, as an employee of Railway Express Agency, Inc., an interstate rail carrier, acting on behalf of himself and others as employees of the company having seniority credit acquired and accumulated by them in the manner prescribed in successive collective agreements theretofore in effect between the respondent company and the respondent brotherhood as statutory collective bargaining representative of their craft. (R. 10)

The action was brought upon the complaint that, although all members of the craft representated are identical in their interest and merit in their employment and there is no basis for discriminating among them, the respondent statutory bargaining representative had violated its duty under the

Railway Labor Act by attempting to amend the seniority provisions of the then existing valid collective agreement with the company so as to allow retroactive seniority credit, antedating the seniority credit of petitioner and employees similarly situated with him in this action, to members of the craft who theretofore were employed under and bound by the same agreements but who had not exercised their right thereunder to acquire seniority in the manner prescribed therein, as a result of which many of said employees for whose exclusive benefit and advantage said amendment was made now appear on the seniority roster of employees as having more favorable seniority credit than petitioner and employees similarly situated with him; and by reason thereof said amendment constitutes nothing more than an attempt to sacrifice in an arbitrary, unlawful, and unconstitutional manner the seniority rights of petitioner and employees similarly situated with him, so as to allow retroactive seniority credit to employees who failed to avail themselves of their right to acquire seniority credit under the aforesaid valid agreements. (R. 10-62)

The amendment complained of was negotiated and entered into exclusively for the benefit and advantage of 532 colored employees; all other employees, white or colored, are expressly excluded from participating in any benefits thereunder. (R. 20)

Petitioner alleged irreparable damage and prayed an injunction to restrain the respondents from acting upon the amendment, and for other relief. (R. 25-26)

On joint petition of all respondents (R. 5-9) the cause was removed to the United States District Court for the Southern District of Florida, upon the ground that it is an action of which the District Courts of the United States have original jurisdiction, being a civil action arising under an Act of Congress regulating commerce (28 U. S. C., sec. 1337), as well as a civil action arising under the Constitution or laws of

the United States the amount in controversy of which exceeds the sum or value of $3,000 (28 U. S. C., sec. 1331).

Upon removal to the District Court respondents filed their respective motions to dismiss (R. 63-65) upon the ground that the complaint fails to state a claim upon which relief can be granted. On October 16, 1953, the District Judge entered final judgment granting the motions and dismissed the complaint without leave to amend and with prejudice (R. 66-67), and later filed a memorandum opinion. (R. 71-79) On November 16, 1953, petitioner appealed to the United States Court of Appeals for the Fifth Circuit (R. 68) and on December 9, 1954, the Court of Appeals rendered its opinion (Appendix A, infra, pp. 8-10) and entered judgment affirming the District Court. (Appendix B, infra, p. 11)

Reasons Relied on for Allowance of Writ

The Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court. It is appropriate to the exercise of this Court's certiorari jurisdiction that the question of law here presented be settled, because its resolution will have immediate importance far beyond the particular facts and parties involved. Collective bargaining under the Railway Labor Act governs the rates of pay, hours of service, seniority, and working conditions of practically every railway and air line employee in the United States. Collective bargaining likewise governs such matters where employees are subject to the National Labor Relations Act. The plans, hopes, and aspirations of all employees subject to these federal statutes are vitally affected by the latitude given or limitations placed upon a collective agent to discriminate among employees having identical interest and merit, when making collective agreements or changing the terms of an existing one. And where, as here, the statute is silent as to the latitude or limitations, the matter is left to judicial decision. It is of

widespread importance and in the public interest that an authoritative determination as to the power of a collective agent in such circumstance be made by this Court as the tribunal invested with that very important function.

This Court in the racial discrimination case of *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, announced that it thought the Railway Labor Act imposes on the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. It is the contention of petitioner that in all cases of collective bargaining under the Railway Labor Act this same duty is imposed on the statutory representative and especially so where, as here, all the employees involved are identical in their interest and merit in their employment and there is no difference in the type of seniority or the work to be performed. If this be so, then the Court of Appeals has decided a federal question in a way in conflict with the above principle announced by this Court in the *Steele* case, supra, which should have been applied in deciding the case at bar.

This Court in the *Steele* case, supra, also said that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, or the competence and skill with which it is performed. Applying this principle to the case at bar, the collective agent had no power to make the amendment complained of.

In opposing this petition respondents will argue that the

amendment complained of was made to correct past discriminations against the members of the craft for whose benefit the amendment was made. This is to argue facts *de hors* the record which properly should appear, if at all, in an answer or other responsive pleading. Neither the uncontroverted allegations of the complaint nor any reasonable inference therefrom supports such argument. Further, if there were past discriminations, they are not chargeable to petitioner and his fellow employees who, under the Railway Labor Act, would be powerless to discriminate. Only the company or the exclusive statutory collective agent, or both, could do this. Also, if there were such discriminations, they were practiced in applying or interpreting an existing valid collective agreement and gave rise to grievances which should have been adjusted before the National Railroad Adjustment Board.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

MARTIN J. PEARL,
Attorney for Petitioner,
204 Smith Building,
Jacksonville 2, Florida.

Jacksonville, Florida,
March 3, 1955.

APPENDIX A

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 14859

F. R. PELLICER, individually on behalf of himself as an employee of RAILWAY EXPRESS AGENCY, INC., ET AL.,

Appellants,

versus

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(December 9, 1954.)

Before HOLMES, BORAH, and RUSSELL, Circuit Judges.

HOLMES, Circuit Judge: This is an action by a railway-

agency employee to have enjoined as unlawful an amendment to a bargaining agreement that modified his senority rights by integration of colored employees with other employees. The action was instituted in a state court and removed to the federal district court. The motion to dismiss was granted because the complaint failed to state a cause of action. The question presented is whether the amendment was unlawful under the Railway Labor Act and the federal Constitution.

The plaintiff contends that the amendment was invalid because it was enacted for the sole benefit of the colored employees. No claim of discharge, layoff, loss of promotion rights, or the like, is alleged to have resulted to plaintiff or to the employees whom he represents. The substance of plaintiff's claim is that any amendment or modification in the provisions of a collective bargaining agreement must operate equally as to all members of the craft without discrimination, and that all must be treated in an identical manner. There is no charge of fraud or bad faith. The law is that changes effectuating differentiations or unequal treatment among employees are not invalid unless some clearly expressed public policy is contravened; and that in the absence of fraud or bad faith the courts will not inquire into the motives which prompt such changes, nor will they substitute their judgment for that of the bargaining agency on the reasonableness of the modifications.

This appeal is from a judgment rendered by the United States district court for the Southern district of Florida, in which an opinion of exceptional merit was written by Judge Bryan Simpson. The case is reported in *Pellicer* v. *Brotherhood of Ry. and S. S. Clerks, etc.*, 118 Fed Supp. 254. It would be a work of super-erogation on our part to attempt to embellish this opinion or to add anything to it. For the reasons therein stated; the judgment appealed from should be affirmed; but there is one paragraph in the opinion so

strikingly in point that, for the sake of emphasis, we think it should be quoted in full:

> "Here, except for the claim amounting to no more than a conclusion of law that the amended agreement was arbitrarily entered into and is arbitrary and discriminatory in its terms and effects, there are no factual allegations in the complain that the Express Company and the Brotherhood did not in good faith negotiate and make the seniority changes effecuated by the amended agreement. It would indeed turn the blade inward' were this Court to hold invalid and unlawful that which appears on the face of the complaint and attached exhibits to be a good faith effort on the part of the Brotherhood and Express Company to comply with pronouncements of the Supreme Court in the racial discrimination cases." 118 Fed. Supp. 257.

Finally, the amendment to the bargaining agreement did not amount to a discrimination against the white employees, but merely rectified an existing discrimination against the colored employees, the effect of which as to the former was *damnum absque injuria*. Consequently the judgment appealed from is affirmed.

AFFIRMED.

APPENDIX B

Judgment of United States Court of Appeals for the Fifth Circuit - Extract from the Minutes of December 9, 1954.

Judgment

F. R. PELLICER, individually on behalf of himself as an employee of Railway Express Agency, Inc., et al.,

No. 14859 versus

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, F. R. Pellicer, individually on behalf of himself as an employee of Railway Express Agency, Inc., and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

ACKNOWLEDGEMENT OF SERVICE BY ATTORNEYS FOR RESPONDENTS

Receipt is hereby acknowledged of four (4) true copies of the foregoing printed petition for writ of certiorari, on this the ..... day of March, A. D. 1955.

Attorney and of Counsel for Respondents, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and Silas McKinney individually and representatively

400 Professional Building,
Jacksonville 2, Florida.

Receipt is hereby acknowledged of six (6) true copies of the foregoing printed petition for writ of certiorari, on this the day ..... of March A. D. 1955.

Attorney and of Counsel for Respondent, Railway Express Agency, Inc., a corporation

1712 Barnett National Bank Building,
Jacksonville 2, Florida.

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HAROLD B. WILLEY, C

No. 637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

F. R. PELLICER, individually on behalf of himself as an employee of Railway Express Agency, Inc., a corporation, and representatively on behalf of similarly situated employees of Railway Express Agency, Inc., a corporation, *Petitioner*,

v.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, a voluntary unincorporated labor organization, RAILWAY EXPRESS AGENCY, INC., a corporation, and SILAS McKINNEY, individually as an employee of Railway Express Agency, Inc., a corporation, and as representative of similarly situated employees of Railway Express Agency, Inc., a corporation, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AND SILAS McKINNEY

Of Counsel:
James L. Crawford
General Counsel, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees
1015 Vine St.
Cincinnati, Ohio

William L. Durden
400 Professional Bldg.
Jacksonville 2, Fla.

Clarence M. Mulholland
Edward J. Hickey, Jr.
James L. Highsaw, Jr.
620 Tower Building
Washington 5, D. C.

Richard R. Lyman
741 National Bank Building
Toledo 4, Ohio
Counsel for Respondents

Dated: April 1, 1955

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR THE BROTHERHOOD RESPONDENTS AND SILAS McKINNEY

OPINIONS BELOW

The opinion of the District Court (R. 71-79) is reported at 118 F. Supp. 254. The opinion of the Court ofAppeals for the Fifth Circuit (App. A of Petition) is reported in 217 F. 2d 205.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

In the absence of fraud, bad faith, or hostile or invidious discrimination, does the Railway Labor Act or the Fifth Amendment of the United States Constitution prohibit a carrier and a statutory collective bargaining representative from making an agreement conferring seniority rights on members of a craft or class who had not previously possessed them, to the relative detriment of other members of the craft or class who had theretofore enjoyed exclusive seniority benefits?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The pertinent provisions of the United States Constitution and of the Railway Labor Act involved are set forth in the Petition at p. 3.

STATEMENT

This litigation began as a suit to permanently enjoin the performance of an agreement entered into in 1952 between the respondent Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (Brotherhood) and respondent Railway Express Agency, Inc. (Railway Express) to accord seniority status with Railway Express to respondent Silas McKinney and the other colored employees of that company at Jacksonville, Florida, represented by the Brotherhood who had not therefore possessed any seniority rights. (R. 10-26)[1] The agreement provided that the names of the colored em-

[1] The suit was originally brought in a Florida State Court, but on petition of respondents was removed to the United States District Court for the Southern District of Florida. (R. 5-9)

ployees should be incorporated on the next Jacksonville Division Seniority roster of Railway Express to be published and should be integrated or "dovetailed" into the existing seniority roster which up to that time had contained only the names of white employees of the express agency. (R. 18, 19) The results of this agreement are shown by comparison of the January, 1952, seniority roster of the Jacksonville Division (R. 28-37), showing only the names of white employees, with the January, 1953, roster containing asterisks added by petitioner to indicate the names of colored employees who were integrated. (R. 38-62) The agreement was executed by Railway Express and the Brotherhood as the collective bargaining representative under the Railway Labor Act (45 U.S.C., Section 151 et seq.), for the craft or class of employees of Railway Express which includes the petitioner and the group of employees he purports to represent and the individual respondent Silas McKinney and those other employees for whom he was sued as a representative. Petitioner's complaint asserted that the agreement was contrary to the due process requirements of the Fifth Amendment to the United States Constitution and in violation of the requirements of the Railway Labor Act in that the Brotherhood had discriminated against petitioner and the other white employees of Railway Express at Jacksonville in providing for the new integrated seniority roster. The complaint did not allege fraud or bad faith by the Brotherhood in executing the agreement. 118 F. Supp. 254, 257.

The respondents and Railway Express moved to dismiss the complaint for failure to state a claim upon which relief could be granted. (R. 63-66) The District Court granted the motions, (R. 66, 67), 118 F. Supp. 254. In so doing the Court rejected petitioner's claim that a collective bargaining representative under the Railway Labor Act must treat equally in a mechanical fashion, all members of a craft whom it represents in the absence of fraud or bad faith. The Court further found that the agreement involved appeared on the face of the complaint and attached

exhibits "to be a good faith effort on the part of the Brotherhood and Express Company to comply with pronouncements of the Supreme Court in the racial discrimination cases," (R. 77), 118 F. Supp. 254, 257. The Court of Appeals for the Fifth Circuit affirmed the District Court action. 217 F. 2d 205.

ARGUMENT

Petitioner bases his application for a writ of certiorari on the ground that the Court of Appeals for the Fifth Circuit has decided an important question of Federal law in a way which is in conflict with the decision of this Court in *Steele* v. *L. & N. R. Co.*, 323 U.S. 192 (Pet. 6). It is argued that the *Steele* decision requires a collective bargaining agreement to be so framed as to extend to and embrace with absolute equality all employees in like circumstances and conditions or who are identical in their interest and merit regardless of the good faith or honesty of purpose of the collective barganing representative. However, we believe it clear that the *Steele* case outlaws only hostile discriminations negotiated in bad faith and based on considerations of an invidious nature, or contravening sound public policy. This interpretation is underscored by the decision in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) which permits the collective bargaining representative a broad range of discretion in negotiating agreements affecting seniority so long as such representative acts in good faith and the result is not contrary to public policy. The agreement here involved clearly meets such a test since its purpose is to remove existing inequalities and to place negro members of the craft on an equal footing with white members. The attempt of petitioner to use the *Steele* case to defeat this result distorts the real significance of that decision which is that a collective barganing representative should act for minority members of the craft fairly, impartially, and without hostile discrimination. That is precisely what the Brotherhood has done in this case.

The agreement is also consistent with a long line of judicial precedents upholding the validity of collective

bargaining agreements which change previously existing seniority rights. *System Federation No. 59* v. *Louisiana & A. Ry. Co.*, 119 F. 2d 509 (C.A. 5, 1941), cert. den. 314 U.S. 656; *Hartley* v. *Brotherhood of Railway & Steamship Clerks*, 283 Mich. 201, 277, N.W. 885 (1938); *Walker* v. *Pennsylvania Reading Seashore Lines*, 142 N.J. Eq. 588, 61 A. 2d 453 (1948); *Edelstein* v. *Duluth, Miscabe & Iron Range Ry. Co.*, 226 Minn. 508, 31 N.W. 2d 465 (1948); *Donovan* v. *Travers*, 285 Mass. 167, 188 N.E. 705 (1934); *Aden* v. *Louisville & N. R. Co.*, 276 S.W. 511 (1921).

Petitioner suggests that neither the allegations of the complaint nor any reasonable inference therefrom supports the conclusion that the agreement involved was executed to correct past inequalities between colored and white members of the craft involved and that such a fact is *de hors* the record. (Pet. 6, 7). However, the complaint clearly shows that prior to January, 1953 no colored employees of Railway Express on its Jacksonville Division had ever been accorded seniority rights. (R. 18, 19, 28-37, 38-62) The effect of the agreement in removing this inequality and carrying out the public policy against racial discrimination is supported by the record (R. 38-62).

Petitioner further suggests that past inequalities affecting colored members of the craft are not chargeable to him and that the proper procedure for their removal was a grievance proceeding before the National Railroad Adjustment Board. (Pet. 7) Petitioner's fault or lack of fault in the matter is irrelevant. Moreover, the complaint alleges that the colored members of the Brotherhood did not have any seniority rights under any agreement prior to 1953 (R. 18). This refutes petitioner's suggestion that the absence of such rights arose out of an interpretation or application of the existing agreement. But even if, assuming *arguendo* that the inequalities in the position of colored members of the craft could have been eliminated by a resort to grievance procedures, this fact would not prevent the Brotherhood in good faith directly removing such inequalities by amending the collective bargaining agreement.

CONCLUSION

The decision below is clearly correct, there is no conflict in decisions, and the petition raises no new issue of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

CLARENCE M. MULHOLLAND
EDWARD J. HICKEY, JR.
RICHARD R. LYMAN
JAMES L. HIGHSAW, JR.
Counsel for the Brotherhood Respondent and Silas McKinney

Of Counsel:

JAMES L. CRAWFORD
General Counsel
Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees

WILLIAM L. DURDEN

April 1, 1955

Certificate of Service

This is to certify that the foregoing brief of the Brotherhood respondent and Silas McKinney in opposition to a petition for a writ of certiorari in Case No. 637 has been served upon the petitioner by depositing three (3) copies thereof in a United States postoffice, with air mail postage prepaid, addressed to counsel of record for petitioner, Mr. Martin J. Pearl at his address, 204 Smith Building, Jacksonville 2, Florida.

EDWARD J. HICKEY, JR.
Counsel for Respondents The Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees and Silas McKinney

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, RAILWAY EXPRESS AGENCY, INC., a corporation, IN OPPOSITION

FLEMING, JONES, SCOTT & BOTTS
Barnett National Bank Building
Jacksonville, Florida

ALSTON, SIBLEY, MILLER SPANN & SHACKELFORD
Citizens & Southern National Bank Building
Atlanta, Georgia

of Counsel for Respondent

CHARLES R. SCOTT
Barnett National Bank Building
Jacksonville, Florida

WM. HART SIBLEY
Citizens & Southern National Bank Building,
Atlanta, Georgia

Counsel for Respondent, Railway Express Agency, Inc., a corporation.

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NO. 637

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, RAILWAY EXPRESS AGENCY, INC., a corporation, IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported in 217 F. 2d 205 and contained in the Petition as Appendix A on pages 8-10. The Court of Appeals, in affirm-

ing the Judgment of the District Court and referring to the District Court's opinion reported in 118 F. Supp. 254 (R 71-79), said: "It would be a work of super-erogation on our part to attempt to embellish this opinion or to add anything to it". For ready reference and for the convenience of this Honorable Court, this Respondent is attaching the opinion of the District Court to this brief as Appendix A (Pgs 12-19).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Where there is no fraud or bad faith involved, does the Railway Labor Act prohibit a statutory collective bargaining representative from negotiating an agreement giving seniority rights to certain members of the craft or class who had not previously acquired such rights, to the relative detriment of other members who had theretofore enjoyed exclusive seniority benefits?

2. Are seniority rights acquired by members of a craft or class under a valid bargaining agreement such vested property rights that they may not be changed or modified by a subsequent valid collective bargaining agreement?

STATUTE INVOLVED

It is this Respondent's contention that only the Railway Labor Act (45 U. S. C. A., Sec. 151, et seq.) is involved in this action and the Fifth Amendment to the United States Constitution is not involved because Petitioner has not been deprived of any property rights without due process of law.

STATEMENT OF THE CASE

In order to furnish this Honorable Court an orderly, clear and concise statement of the facts involved in this action and to avoid an argumentative statement of the case, this Respondent shall take the liberty of borrowing from the District Court's opinion (R 71-79; Appendix A, Pgs. 12-19) rather extensively in its statement of the case.

The Respondent, Railway Express Agency, Inc., a corporation, will hereinafter be referred to as the Express Agency. The Respondent, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, a voluntary unincorporated labor organization, will hereinafter be referred to as the Brotherhood and the Respondent, Silas McKinney, will hereinafter be referred to as McKinney.

Petitioner is an employee at Jacksonville, Florida, of Respondent Express Agency and a member of the craft of clerks, freight handlers, express and station employees. Respondent Brotherhood is the collective bargaining representative under the Railway Labor Act, 45 U. S. C. A., Sec. 151, et seq., of the members of this craft. The wages, rules and working conditions applicable to Petitioner's employment are established and governed by a bargaining agreement between the Express Agency and the Brotherhood (R27).

By this action Petitioner seeks, on his own behalf and on behalf of other employees alleged to be similarly situated, to have enjoined as unlawful under the Railway Labor Act and the Federal Constitution, an amendment to the bargaining agreement made by the Express Agency and the Brotherhood in 1952 modifying seniority rights.

The material facts alleged in the complaint may be summarized as follows: Since the time of Petitioner's initial employment in 1929 agreements have been in effect between the Express Agency and the Brotherhood covering Petitioner's

hours of service, working conditions and seniority rights. It is alleged that all such agreements except the one made in 1952, of which Petitioner complains, prescribed certain prerequisites for acquiring seniority rights. A copy of such an agreement alleged to contain these requirements is attached as an exhibit to the complaint (R27). In December 1930 Petitioner's seniority was established pursuant to said requirements and his name and seniority date placed on a seniority roster posted in January 1931. It has similarly appeared on all rosters posted for the years 1932 to 1952, as is evidenced by copy of seniority roster posted in January 1952 and attached by Petitioner as an exhibit to his complaint (R 29-37).

It is further alleged that the Respondent McKinney, a colored employee of the Express Agency at Jacksonville, did not appear on said roster or on any seniority roster posted during the period 1932-1952, and that consequently neither McKinney nor any other colored employee of the craft at Jacksonville has ever validly acquired seniority rights.

As a result of authorized and valid conferences between the Express Agency and the Brotherhood, an agreement was reached late in 1952 concerning a change in the seniority roster to be posted by the Express Agency in January 1953, covering all employees. This same new seniority roster was posted in January 1953 by the Express Agency pursuant to the aforesaid agreement between the Express Agency and the Brotherhood and contained the name of the Respondent McKinney and the names of 531 other colored employees (R 38-62). A copy of said seniority roster was attached by the Petitioner as an exhibit to his complaint and disclosed that the seniority dates assigned to the colored employees have been integrated with the dates assigned to the white employees so as to result in a listing of employees, white as well as colored, in chronological order. The result is to place Petitioner and certain of the other white employees lower on the seniority roster than they were during the years 1932-1952, and now would be had not the integration of

the colored employees been effected by the aforesaid agreement between the Respondents, the Express Agency and the Brotherhood.

Petitioner contends that the seniority dates assigned to the colored employees were never validly acquired pursuant to the requirements of the bargaining agreement as it existed prior to the said agreement of 1952 (R 27), and resulted only because of the allegedly invalid agreement made between the Express Agency and the Brotherhood in 1952.

No claim of discharge, layoff, loss of promotion rights, or the like, is alleged to have resulted to Petitioner or to the employees whom he purports to represent. The cause of action is based solely upon the claim that the 1952 agreement was unlawfully entered into and is unlawful in its terms and effects in violation of the Railway Labor Act and the constitutional guaranty of equal protection because it was allegedly entered into only for the benefit and advantage of the colored employees of the Jacksonville seniority district and not for the benefit and advantage of all members of the craft or class.

The procedural aspects of this action are adequately and correctly stated in the last two paragraphs of Petitioner's statement of the case on pages 4 and 5 of the petition.

ARGUMENT

The issue involved in the present case may be reduced to the question of whether or not the amendatory agreement of 1952 between the Brotherhood and the Express Agency was lawfully entered into within the scope of the Brotherhood's authority to negotiate and consummate agreements for and on behalf of the represented craft or class. The decisions of the District Court and the Circuit Court of Appeals holding this amendatory agreement to be lawful were clearly

correct, and there is no question of Federal law involved which has not already been decided by this Honorable Court.

Petitioner did not allege in his complaint or contend before the Courts below that the amendatory agreement of 1952, which gave rise to this action, was the result of any fraud or bad faith exercised on the part of the Brotherhood or the Express Agency against Petitioner and the other white employees similarly situated. Neither does he now contend in his petition before this Honorable Court that the amendatory agreement was the result of fraud or bad faith.

On the contrary, the premise upon which Petitioner stands is that, notwithstanding complete good faith and honesty of purpose in the negotiations, any collective bargaining agreement is invalid which does not treat uniformly and without discrimination all members of a craft or class who are identical in interest and merit. In support of this theory Petitioner alleges that all members of respondent Brotherhood were identical in interest and merit; that the amendatory agreement of 1952 does not operate uniformly and without discrimination as to all such members because it gives seniority rights to the colored employees for the first time and operates to the detriment of Petitioner and other similarly situated white employees by lowering their relative seniority standing; and that this amendatory agreement is, therefore, illegal and void.

Petitioner contends that the decision of the Circuit Court of Appeals is in conflict with the principle of law announced by this Court in the racial discrimination case of *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173. The contention of this respondent is that the Steele case is not controlling in this action because in the Steele case the bargaining agent was charged with bad faith and disloyalty to the colored employees in negotiating the bargaining agreement then in controversy. Such fact is evidenced by the following language of this Court in the Steele case (Text, 323

U.S. 196 and 197):

> "The Brotherhood has acted and asserts the right to act as exclusive bargaining representative of the fireman's craft. It is alleged that in that capacity it is under an obligation and duty imposed by the Act to represent the Negro firemen impartially and in good faith; but instead, in its notice to and contracts with the railroads, it has been hostile and disloyal to the Negro firemen, has deliberately discriminated against them, and has sought to deprive them of their seniority rights and to drive them out of employment in their craft, all in order to create a monopoly of employment for Brotherhood members".

The facts of the Steele case clearly show bad faith on the part of the bargaining agent toward the colored firemen and a deliberate attempt on the part of the bargaining agent to arbitrarily discriminate against the colored employees to the extent of driving them out of employment, such discrimination being based on racial considerations alone.

No such situation exists in the present case. As stated above, the Petitioner has never contended or alleged that either the Brotherhood or the Express Agency acted in bad faith in negotiating the amendatory agreement here in controversy. Neither do the fact of the present case present to this Court any hostile discrimination or bad faith even remotely akin to that presented in the Steele case.

This respondent contends that the question presented in this action has already been disposed of by this Court in the comparatively recent case of *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 73 S. Ct. 681, 97 L. Ed. 1048. In the Huffman case a petition was filed by an employee union member seeking to have declared invalid a collective bargaining agreement whereby his employer allowed certain employees seniority credits for both pre-employment and post-employment military service. This Court, in a unanimous decision, up-

held the validity of the bargaining agreement and in delineating the wide range of reasonableness which must be allowed a bargaining agent in its negotiations, Mr. Justice Burton, speaking for the Court said (345 U. S., Text 338-339):

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees. The mere existence of such difference does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
>
> "Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, lay-offs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and time or labor devoted to related public service, whether civil or miliary, voluntary or involuntary. See, e. g., Hartley v. Brotherhood of R. & S. S. Clerks, 283 Mich. 201, 277 N. W. 885; and see also Williamson & Harris, Trends in Collective Bargaining (1945), 100-103".

Further authority for the proposition that seniority rights

may be changed, modified or reduced by a subsequent valid bargaining agreement is found in the case of *Hartley* v. *Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station Employees,* 283 Mich. 201, 277 N. W. 885, cited by this Honorable Court in the Huffman case, supra.

In the Hartley case the Court said, 277 N. W., Text 887:

> "The seniority rights acquired by her did not arise by virtue of her contract of employment with her employer, but existed by reason of the agreement of 1921 between the Railway and the Brotherhood. Ryan v. New York Cent. R. Co., 267 Mich. 202, 255 N. W. 365. This agreement was executed for the benefit of all the members of the Brotherhood, and not for the individual benefit of plaintiff. When by reason of changed economic circumstances, it became apparent that the earlier agreement should be modified in the general interest of all members of the Brotherhood it was within the power of the latter to do so, notwithstanding the result thereof to plaintiff. The Brotherhood had the power by agreement with the Railway to create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or destroy these rights in the interest of all the members.
>
> "A different situation might be presented had the agreement of 1932 been accomplished as a result of bad faith, arbitrary action, or fraud directed at plaintiff on the part of those responsible for its execution. No claim or showing of such a nature is made in this case. * * * * * *"

This respondent submits that these cases are controlling in this action and that even though Petitioner and the other white employees similarly situated might have lost some of their seniority rights by the amendatory agreement of

1952, still the agreement is valid and binding where there is no charge of fraud or bad faith.

With respect to Petitioner's contention that the Fifth Amendment to the United States Constitution is involved here, this respendent submits that the Petitioner's seniority rights acquired under agreements prior to the amendment here in controversy never attained the status of vested property rights so as to fall within the purview of the Fifth Amendment. Such rights as he had were created by a collective bargaining agreement and were at all times subject to modification or change by subsequent bargaining agreements. This is made very clear by the decisions in the Huffman and Hartley cases, supra.

CONCLUSION

This Court has consistently held with reference to the establishment, modification and extinguishment of seniority rights under a collective bargaining agreement, that contractual provisions of such bargaining agreements establishing such seniority rights do not create a permanent status or give an indefinite tenure, but are subject to modification by the contracting parties.

Petitioner's contention that the amendatory agreement here involved is an illegal bargaining agreement and that his alleged "accrued" seniority rights, which stemmed from the original agreement (R 27), cannot be modified by said amendatory agreement is directly contrary to the applicable law.

The latest expression of this Court on the question of modifying existing seniority rights by collective bargaining agreements, as set forth in the Huffman case (1953) is authority for the principle that in the absence of fraud or bad faith the Courts will not inquire into the motives which prompt such changes, or substitute their judgment on the reasonable-

ness of the modifications effected.

In effect, Petitioner here is now asking this Court to reverse its opinion as expressed in the Huffman case.

Petitioner does not allege or claim in his complaint any fraud or bad faith of the parties to the amendatory agreement.

Under these circumstances it conclusively appears that the District Judge and the Circuit Court of Appeals correctly ruled in accordance with the clear and well established law applicable to the undisputed facts of this case in dismissing the complaint and the petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES R. SCOTT
Barnett National Bank Building
Jacksonville, Florida

WM. HART SIBLEY
Citizens & Southern National Bank Building,
Atlanta, Georgia

Counsel for Respondent,
Railway Express Agency, Inc.,
a corporation.

FLEMING, JONES, SCOTT & BOTTS
Barnett National Bank Building
Jacksonville, Florida

ALSTON, SIBLEY, MILLER, SPANN & SHACKLEFORD
Citizens & Southern National Bank Building
Atlanta, Georgia

of Counsel for Respondent

APPENDIX A

PELLICER, et al. v. BROTHERHOOD OF RY. & S. S. CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, et al.

Civ. A. No. 2591-J.

United States District Court, S. D. Florida Jacksonville Division.

Nov. 16,1953.

SIMPSON, District Judge.

Plaintiff is an employee at Jacksonville, Florida, of the defendant Railway Express Agency and a member of the craft of clerks, freight handlers, express and station employees. Defendant Brotherhood of Railway and Steamship Clerks is the collective bargaining representative under the Railway Labor Act, 45 U.S.C.A. Sec. 151 et seq., of the members of this craft. The wages, rules, and working conditions applicable to plaintiff's employment are established and governed by a bargaining agreement between the Express Company and the Brotherhood.

By this action plaintiff seeks, on his own behalf and on behalf of other employees alleged to be similarly situated, to have enjoined, as unlawful under the Railway Labor Act and the federal constitution, an amendment to the bargaining agreement made by the Express Company and the Brotherhood in 1952 modifying seniority rights.

The material facts alleged in the complaint may be summarized as follows: Since the time of plaintiff's initial employment in 1929, agreements have been in effect between the Express Company and the Brotherhood covering plain-

tiff's hours of service, working conditions, and seniority rights. It is alleged that all such agreements except the one made in 1952 of which plaintiff complains prescribed certain prerequisites for acquiring seniority rights. A copy of such an agreement alleged to contain these requirements is attached as an exhibit to the complaint. In December of 1930 plaintiff's seniority was established pursuant to said requirements and his name and seniority date placed on a seniority roster posted in January 1931. It has similarly appeared on all rosters posted for the years 1932 to 1952.

It is further alleged that the defendant Silas McKinney, a colored employee of the Express Company at Jacksonville, did not appear on said roster or on any seniority roster posted during the period 1932-1952, and that neither McKinney nor any other colored employee of the craft at Jacksonville have ever validly acquired seniority rights.

As a result of an amendment to the agreement made by the Express Company and the Brotherhood in late 1952, a seniority roster was posted in January of 1953 which contained the name of the defendant Silas McKinney and the names of 531 other colored employees. A copy of said seniority roster, attached by plaintiff as an exhibit to the complaint, discloses that the seniority dates assigned to the colored employees have been integrated with the dates assigned to the white employees so as to result in a listing of employees, white as well as colored, in chronological order. The result is to place plaintiff and certain of the other white employees lower on the seniority roster than they were during the years 1932-1952 and now would be had not the integration of the colored employees been effected by agreement between defendants Brotherhood and Express Company.

Plaintiff asserts that the seniority dates assigned to the colored employees were never validly acquired pursuant to the requirements of the bargaining agreement as it existed prior to late 1952, and resulted only because of the allegedly

invalid amendment to the agreement made in 1952.

No claim of discharge, layoff, loss of promotion rights, or the like is alleged to have resulted to plaintiff or to the employees which he purports to represent. The cause of action is based solely upon the claim that the 1952 agreement was unlawfully entered into and is unlawful in its terms and effects in violation of the Railway Labor Act and the Constitutional guaranty of equal protection because it was allegedly entered into only for the benefit and advantage of the colored employees of the Jacksonville seniority district and not for the benefit and advantage of all members of the craft or class.

The complaint was orginally filed in the Circuit Court, Fourth Judicial Circuit, Duval County, Florida, from which it was removed jointly by all defendants to this Court pursuant to the provisions of Section 1441 of Title 28, U.S. Code, as a cause of action arising under a federal law regulating commerce as well as the Constitution and laws of the United States, and as such within the original jurisdiction of the federal district courts. 28 U.S.C.A. Secs. 1331 and 1337.

All defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be granted.

At the outset, the question of jurisdiction of the subject matter of the complaint must be considered. If the asserted cause of action is based upon an alleged breach of a bargaining agreement, exclusive jurisdiction is vested in the National Railroad Adjustment Board by Section 3 of the Railway Labor Act, as amended, 45 U.S.C.A. Sec. 153. Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795; Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Railway Co., 5 Cir., 199 F. 2d 384; Hettenbaugh v. Airline Pilots Ass'n International, 5 Cir., 189 F. 2d 319.

But if the complaint alleges a violation of some right granted by a federal statute or by the federal Constitution, a federal question is presented and the court has jurisdiction. Tunstall v. Brotherhood of L. F. & E., 323 U.S. 210, 65 S. Ct. 235, 89 L. Ed. 187; Brotherhood of Locomotive Firemen & Enginemen v Mitchell, 5 Cir., 190 F. 2d 308; Hettenbaugh v. Airline Pilots Ass'n International, 5 Cir., 189 F. 2d 319, 320.

Here it is clear that plaintiff does not base his cause of action on any alleged breach of a bargaining agreement. To the contrary, he specifically negates reliance on any provision of the agreement which would require interpretation of application, and limits his cause of action to the claim that the 1952 amendment to the agreement made by the Express Company and the Brotherhood was unlawfully entered into and is unlawful in its terms and effects and thus is a violation of the Railway Labor Act and plaintiff's rights under the federal Constitution. The Railroad Adjustment Board clearly does not have jurisdiction to determine such a question. Consequently, the cause of action asserted is one within the jurisdiction of this Court.

It does not necessarily follow, however, because jurisdiction exists that the claim is well founded. It is well established that a failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for for want of jurisdiction. Montana-Dakota Utilities Co. v. Northwestern Public Service Co. 341 U.S. 246, 249, 71 S. Ct. 692, 95 L. Ed. 912; Bell v. Hood, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 939. For reasons to be discussed, I am of the opinion that the complaint fails to make out a cause of action and that therefore defendants' motion to dismiss should be granted.

The substance of plaintiff's claim is that any amendment or modification in the provisions of a collective bargaining

agreement must operate equally as to all members of the craft without discrimination, and that all must be treated in an identical manner. This was confirmed at the time of oral argument. No fraud or bad faith is claimed.

In support of this position plaintiff relies on the holding of the Supreme Court in Steele v. Louisville & Nashville Railway Co., 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173 and other similar decisions involving racial discrimination. See Tunstall v. Brotherhood of L. F. & E., 323 U.S. 210, 65 S. Ct. 235, 89 L. Ed. 187; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283; Brotherhood of Locomotive Firemen & Enginemen v. Mitchell, 5 Cir., 190 F. 2d 308; Rolax v. Atlantic Coast Line Railroad Co., 4 Cir., 186 F. 2d 473. But as I read these decisions they do not stand for the proposition for which plaintiff contends. In the Steele case the complaint disclosed a change in an agreement based solely on race, the effect of which would have eliminated Negro firemen from service. The Court held that discriminations based on race alone were "obviously irrelevant and invidious", and constituted a violation of the obligation of a bargaining representative under the Railway Labor Act to represent all employees of the craft fairly and without hostile discrimination because of race. But the Court also stated, 323 U.S. 192, 203, 65 S. Ct. 232:

> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of

whose members are not identical in their interest or merit."

Here, except for the claim amounting to no more than a conclusion of law that the amended agreement was arbitrarily entered into and is arbitrary and discriminatory in its terms and effects, there are no factual allegations in the complaint that the Express Company and the Brotherhood did not in good faith negotiate and make the seniority changes effectuated by the amended agreement. It would indeed "turn the blade inward" were this Court to hold invalid and unlawful that which appears on the face of the complaint and attached exhibits to be a good faith effort on the part of the Brotherhood and Express Company to comply with pronouncements of the Supreme Court in the racial discrimination cases.

It is significant that in cases where challenged changes in seniority provisions did not involve racial discrimination, the courts consistently have refused to upset the agreement. Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S. Ct. 681, 97 L. Ed. 1048; System Federation No. 59 of Railway Employees' Department of American Federation of Labor v. Louisiana & A. Ry. Co., 5 Cir., 119 F. 2d 509, certiorari denied 314 U.S. 656 62 S. Ct. 108, 86 L. Ed. 526; Hartley v. Brotherhood of Railway & Steamship Clerks, 283 Mich. 201, 277 N.W. 885; Elder v. New York Central Ry. Co., 6 Cir., 152 F. 2d 361; Lewellyn v. Fleming, 10 Cir., 154 F. 2d 211. These cases establish that seniority rights stem either from a statute or are created by contract; that contractual provisions of bargaining agreements establishing such rights do not create a permanent status or give an indefinite tenure, but are subject to modification by the contracting parties; that changes effecting differentiations or unequal treatment among employees will not be invalidated unless some clearly expressed public policy is contravened; and that in the absense of fraud or bad faith the courts will

not inquire into the motives which prompt such changes or substitute their judgment on the reasonableness of the modifications effected.

The latest authoritative expression to this effect is that of the Supreme Court in Ford Motor Co. v. Huffman, supra, decided on April 6, 1953. There the Court reversed a decision of the United States Court of Appeals for the Sixth Circuit which had held the mere fact of discrimination as among employees sufficient to invalidate changes in seniority provisions. Huffman v. Ford Motor Co., 6 Cir., 195 F 2d 170, 174. In rejecting this view, the Supreme Court said, 345 U.S. 338, 73 S. Ct. 686, 97 L. Ed. 1048:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existance of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
>
> "Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees,

> their family responsibilities, injuries received in course of service, and time or labor devoted to related public service, whether civil or military, voluntary or involuntary. See, e. g., Hartley v. Brotherhood of (R. & S. S.) Clerks, 283 Mich 201, 277 N.W. 885; and see also, Williamson & Harris, Trends in Collective Bargaining (1945), 100-103."

In the light of these observations, plaintiff's claim that all members of the craft must be treated equally and without discrimination must be rejected as contrary to established law.

The prayer for an injunction is denied, and the motions to dismiss are granted. An order in conformity with this opinion has previously been entered.

ACKNOWLEDGMENT AND PROOF OF SERVICE

I hereby certify that I received five (5) true copies of the foregoing printed brief of Respondent, Railway Express Agency, Inc., on this ..... day of March, A. D. 1955.

Attorney for Petitioner,
204 Smith Building,
Jacksonville, 2, Florida

One of The Attorneys for Respondent,
Brotherhood of Railway and
Steamship Clerks, etc., and
Respondent, Silas McKinney,
400 Professional Building,
Jacksonville, 2, Florida.